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Steve - Can you please review this and let me know your thoughts? I will need to file a reply on Tues or Wednesday. I think it likely that our motion will be heard on Thursday, May 6.

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**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF THE AGENCY
INITIATED MODIFICATION OF THE
HAZARDOUS WASTE FACILITY PERMIT
FOR THE WASTE ISOLATION PILOT PLANT
CARLSBAD, NEW MEXICO
EPA ID NO. NM4890139088**

No. HWB 04-01(M)

**PERMITTEES' REPONSE IN OPPOSITION TO
ENVIRONMENT DEPARTMENT'S MOTION IN LIMINE**

COME NOW the United States Department of Energy (DOE) and Washington TRU Solutions, LLC (Permittees) and hereby submit their Response in opposition to the New Mexico Environment Department's (NMED) Motion in Limine.

I. INTRODUCTION AND STANDARD OF REVIEW

NMED has requested the exclusion of evidence "that relates to the chemical or physical characteristics of new waste streams that were not contemplated, analyzed or reviewed by NMED when the original permit was issued." Motion in Limine at 1. NMED contends that such evidence is beyond the scope of this proceeding and is therefore irrelevant. The Permittees object to NMED's Motion in Limine because the motion is overly broad and seeks to exclude information about RCRA regulated hazardous waste that is directly relevant to the proposed agency-initiated permit modification. In particular, the motion would prohibit the introduction of evidence that is directly relevant to the Permittees' opposition to the proposed permit modification.

The Hearing Officer is required to admit "all relevant evidence that is not unduly prejudicial or repetitious, or otherwise unreliable or of little probative value." 20.1.4.400.B NMAC. "An agency should receive all evidence which is competent, relevant and material,

regardless of its weight, and a refusal to hear such evidence can constitute a denial of due process." 2 Am.Jur. 2d, Administrative Law, §345; Charles Koch, *Administrative Law and Practice*, Vol. 2, §5.52 (1997). The New Mexico Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SCRA 2003, 11-401. Any doubts about admissibility and relevancy should be resolved in favor of allowing the evidence to be presented. *Brown v. General Insurance Co.*, 70 N.M. 46, 54, 369 P.2d 968 (1962); *State v. Stampley*, 1999-NMSC-027, ¶38, 127 N.M. 426 (1999).

II. ARGUMENT

In order to modify the WIPP Hazardous Waste Facility Permit (HWFP) on its own initiative, NMED must meet the for cause requirement of 20.4.1.900 NMAC (incorporating 40 CFR §270.41). For the proposed modification that is now before the Hearing Officer, NMED must show that it has received new information that was not available at the time the permit was issued and that, had the new information been available at the time of permit issuance, it "would have justified the application of different permit conditions at the time of issuance." 40 CFR §270.41(a)(2).

A. NMED's Motion in Limine is overly broad.

NMED's motion in limine is overly broad because it seeks to exclude a broad category of relevant RCRA evidence. The Hearing Officer has jurisdiction to consider matters arising under RCRA and the implementing regulations. RCRA defines hazardous waste based on its chemical and physical characteristics. 20.4.1.200 NMAC (incorporating 40 CFR §261.3). Permit conditions are developed, in part, to ensure that the owner or operator is able to obtain enough

information about the chemical and physical characteristics of a particular waste to ensure that it can be treated, stored or disposed of in accordance with the applicable RCRA regulations.

20.4.1.500 NMAC (incorporating 40 CFR §264.13(a)). Evidence about the physical and chemical characteristics of a particular waste stream are relevant to the question of whether NMED would have been justified in applying different permit conditions in 1999.

Waste analysis activities mandated in the WIPP HWFP are required to be performed on a waste stream basis. Waste streams are analyzed by selecting individual containers that are chosen to be representative of the physical and chemical characteristics of the waste within the waste stream. Identifying these chemical and physical components is the crux of the WAP and the determination of the acceptability of the waste for disposal at WIPP. The specific information required by the WAP includes sufficient chemical and physical information to 1) confirm the physical form and exclusion of prohibited items (including incompatible waste); 2) determine the presence of toxicity characteristic contaminants listed in 20.4.1.200 NMAC (incorporating 40 CFR, §261.24) as specified in Permit Attachment O; 3) determine the presence of F-listed and P-listed solvents or waste (F001, F002, F003, F004, F005, F006, F007, F009, P015) found in 20.4.1.200 NMAC (incorporating 40 CFR §261.31); 4) determine the presence of hazardous constituents included in 20.4.1.200 NMAC (incorporating 40 CFR §261 Appendix VIII) as specified in HWFP Tables B-1, B-3 and B-4, as well as any other hazardous constituent identified through acceptable knowledge. (WIPP HWFP at B-2). Each of these requirements consists of physical and chemical information about the waste. Excluding such information from the hearing would unduly limit the Permittees' ability to demonstrate that future wastes can be adequately characterized within the bounds of the existing permit.

The Motion in Limine is overly broad because it seeks to exclude evidence about the physical and chemical characteristics of *all* waste streams that were not included in the Transuranic Waste Baseline Inventory Report (Rev. 2)(TWBIR). The exclusion would include information about the waste streams that may not be directly traceable to the TWBIR that have already been disposed of at WIPP. Evidence about such waste streams is relevant because it demonstrates that the HWFP already contains provisions for analyzing waste streams that may not be directly traceable to the TWBIR.

B. The evidence that NMED seeks to exclude is relevant to the Permittees' opposition to the proposed permit modification.

The Permittees object to the proposed modification on a number of grounds. The Permittees dispute NMED's contention that it has received new information that was not available at the time the WIPP HWFP was issued in 1999. The Permittees also dispute NMED's contention that different permit conditions would have been justified when the HWFP was issued. The Permittees should be allowed to introduce all relevant evidence, including evidence concerning the physical and chemical characteristics of wastes that were not included in the TWBIR, in support of their opposition to the proposed permit modification. The evidence that NMED seeks to exclude is directly relevant to a number of factual issues that are in dispute and that are of consequence to the determination of whether the proposed permit modification should be approved.

NMED contends that, at the time the permit was issued, a prohibition against waste that was not included in the TWBIR would have been justified. Fact Sheet at 4. NMED has stated that the waste that was not included in the TWBIR "has not been evaluated by the state for compatibility with TRU mixed waste or for other characteristics that may make disposal at WIPP a danger to public health or the environment. It is on this basis that NMED proposes to modify

the permit to prohibit wastes that are not directly traceable to the TWBIR." *Id.* In support of the Motion in Limine, NMED alleges that "[o]nce it is established that a waste stream is not directly traceable to the inventory upon which the original permit was based, it is irrelevant to this proceeding whether the new waste stream is compatible or can be safely disposed at WIPP." Motion in Limine at 7. The Motion in Limine assumes that NMED is correct in stating that only waste streams directly traceable to the TWBIR may be disposed of at WIPP. The Permittees contend that NMED's position is incorrect and argue that waste acceptance is based on compliance with the permit conditions, which apply to all waste, not on the inclusion of a particular waste stream in the TWBIR. This is a basic fact of consequence that is in dispute. NMED has the burden of proving that the permit modification should be granted. Part of the burden is proving that the alleged facts and assumptions supporting the proposed permit modification are true. NMED is trying to use the Motion in Limine to have their assumptions adopted without going through the hearing process. The evidence that NMED is trying to have excluded is directly relevant to demonstrating that one of the basic assumptions underlying the permit modification is incorrect.

The Permittees contend that NMED has mischaracterized the role that the TWBIR played in developing permit conditions, which is directly relevant to the question of whether different permit conditions would have been justified when the permit was issued in 1999. The Permittees will offer evidence that NMED is incorrect in stating that the analyses that were "performed to support the permit" only applied to TWBIR waste. The Permittees will also offer evidence to show that, when the permit was issued, NMED would not have been justified in prohibiting wastes that were not directly traceable to the TWBIR because the analyses performed, and the

resulting permit conditions, applied to all waste, not just waste streams that were included in the TWBIR.

The Permittees will also introduce evidence showing that the permit modification must fail because the permit already requires a compatibility analysis for all waste and NMED has not identified "other characteristics" that non-TWBIR waste may have to be analyzed for. The HWFP was written to address all the waste physical and chemical characteristics that are important to managing hazardous waste in compliance with the RCRA standards. 40 CFR § 264.13(a). NMED alludes to "other characteristics" which it implies were not identified during the permit hearing. The Permittees may be precluded from eliciting precise information regarding these "other characteristics" if they cannot, in fact, discuss the chemical and physical nature of waste streams in question.

The HWFP must include all conditions necessary for compliance with RCRA and for the safe management and disposal of TRU mixed waste, including general waste information and waste analysis requirements. The Permit includes waste acceptance criteria (TSDF-WAC) and a waste analysis plan (WAP) that set forth the criteria and procedures, applicable to all waste, that determine waste acceptability. The HWFP already requires that all waste to be disposed of at WIPP be analyzed for compatibility. The evidence that NMED seeks to exclude is relevant to demonstrating that all waste parameters necessary for the safe management and disposal of TRU mixed waste have already been identified and have been incorporated into the HWFP as conditions and that those permit conditions are applicable to all TRU mixed waste. Satisfying the requirements of the HWFP can only be accomplished using physical and chemical information about the waste. Therefore, these data become important proof that the non-TWBIR waste streams can be evaluated for acceptability at WIPP without the proposed agency-initiated

permit modification. Evidence about the physical and chemical characteristics of waste streams that were not included in the TWBIR, particularly evidence demonstrating that such waste streams can be analyzed for compatibility and safe disposal at WIPP, is directly relevant to showing that the conditions of the HWFP apply to all waste, not just waste identified in the TWBIR.

The Permittees will introduce evidence to show that the analyses performed in support of the permit conditions, including the compatibility analysis, applied to all waste, not just those that may be directly traceable to the TWBIR. Evidence concerning the chemical and physical characteristics of waste streams that were not included in the TWBIR is relevant to demonstrating that NMED is incorrect in its contention that a prohibition against additional waste would have been justified. The evidence is relevant to demonstrating that NMED draws the wrong conclusions from its statement that the permit conditions were "based on the chemical and physical analysis of waste streams identified in the TWBIR, and was not based on unidentified new waste streams." Motion in Limine at 4. Evidence that waste streams not directly traceable to the TWBIR are compatible and may be safely disposed of at WIPP would show that NMED is incorrect in its assertion that the analyses performed were only applicable to TWBIR waste. It would also show that the current permit conditions are adequate to determine the acceptability of all TRU mixed waste.

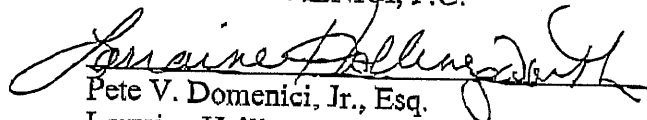
The evidence that NMED seeks to exclude is relevant to demonstrating that all of the necessary parameters for safe disposal have already been identified and analyzed. The evidence is relevant to show that NMED is incorrect in its characterization of the relationship between the TWBIR information and the permit conditions. The evidence which NMED seeks to exclude is relevant to demonstrating that it is the TSDF-WAC and the WAP that determine the acceptability

of waste for disposal at WIPP, regardless of whether a particular waste stream is directly traceable to the TWBIR. Such evidence is also relevant to demonstrating that the analyses performed prior to the issuance of the permit, including compatibility analysis, are applicable to all TRU mixed waste, not just those listed in the TWBIR. The evidence that NMED seeks to exclude is relevant RCRA evidence that demonstrates how the current permit conditions, including the TSDF-WAC and the WAP, work to determine the acceptability of all waste that is proposed for disposal at WIPP.

Therefore, because the evidence that NMED seeks to exclude is directly relevant to factual issues that are in contention, the Motion in Limine should be denied.

Respectfully submitted,

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I hereby certify that on the 30th day of April, 2004
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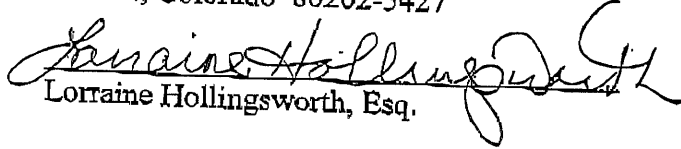
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